

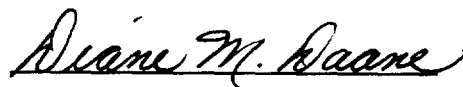
***In Defense of Public Defense: Explorations,  
Explanations, and Refutations of Common  
Misconceptions of the Public Defender***

An Honors Thesis (HONRS 499)

by

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A handwritten signature in cursive script that reads "Diane M. Daane". The signature is written in dark ink and is positioned centrally on the page.

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## **HONORS THESIS PROPOSAL**

In my senior honors thesis for I.D. 499, I will identify the major misconceptions of the public defender and his or her work, identify the basis of, and refute the validity of these misconceptions. I will discuss the history and evolution of appointed legal counsel in order to establish a viable framework within which to view public defense--therefore enabling the reader to perceive the origins of the public's misconceptions.

## **I. INTRODUCTION**

"Public defense"--the two words placed together sound impressive. Webster's School & Office Dictionary (1977) defines *public* as "of or for the people as a whole" and *defense* as "resistance." Placed together, the connotative meaning becomes "resistance for the people." And placed into a proper context, this "resistance for the people" protects those qualified individuals' (the indigents) constitutional right to a fair trial. So just from the denotative meanings of the words *public* and *defense*, we derive a connotative meaning that seems inherently good in all respects.

Then why all the controversy about public defenders? Why do the American people scoff at a concept that was created to protect them? What is it about public defense and the lawyers who provide this public service that create a threatening presence within society? Why does the public accept such atrocities as governmentally controlled propaganda, corrupt police officers and other government employees, and certain governmental monopolies, yet not recognize the importance of the public defender system? All of these questions will be answered in the following pages.

In this thesis, I will take an affirmative stance on the importance of the public defender system. Realizing that all arguments have two sides--affirmative and negative--I will provide refutations to the arguments (or misconceptions in this thesis) of the negative side (or the public), but at the same time, I acknowledge that (1) it would be just as feasible to take a negative stance on public defense; (2) the public probably has positive views as well as negative ones of the public defender system; and (3) these positive views of the public on public defense could just as easily be refuted by one presenting the negative side of public defense.

So, in this thesis I will identify what I consider as the seven major misconceptions of the public defender and his or her work, identify the basis of, and refute the validity of these misconceptions. I will discuss the history and evolution of appointed legal counsel in order to establish a viable framework within which to view public defense--therefore enabling the reader to perceive the origins of the public's misconceptions.

## **II. HISTORY OF PUBLIC DEFENSE**

In a free society, you have to take some risks. If you lock everybody up, or even if you lock up everybody you think might commit a crime, you will be pretty safe. But you will not be free. By living under a democracy, the individual has an abundance of discretion and as a result, sometimes overuses it. But, this type of government is based on freedom, and its freedom is protected by the Bill of Rights. The Sixth Amendment of the United States Constitution states the following:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, by law, and to be informed of the nature and cause of that accusation; to be confronted with the witness against him; to have the compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."<sup>1</sup>

This amendment was ratified so that the indigent, or poor, could enjoy a fair trial as well as could the wealthy.

The attorney appointed to defend the indigent is the public defender, defined as "a lawyer employed by the State to defend the accused indigent."<sup>2</sup> When tracing the origin of the United States' public defense system, it must be noted that the concept is

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<sup>1</sup> Neubauer, 1988, p. 21

<sup>2</sup> Barak, 1975, p. 2

not a new one; a public defender system was founded in ancient Rome with the same purpose as our Sixth Amendment--to assure that the lower class had the same opportunity to a fair trial as did the wealthy aristocrats.<sup>3</sup> As denoted by the extreme disparity of social classes in ancient Rome, however, and by such atrocities found in the Coliseum, one would probably assume that this system did little to support the plight of the poor. 1896 was the year that the public defender movement began in the United States<sup>4</sup>, and its chief advocate was Clara Shortridge Foltz.<sup>5</sup> The system was originated by the judicial branch as charity by the attorneys<sup>6</sup>, and eventually two other methods of assigning counsel to indigents came about: the court appointed system, where the judge makes appointments on an individual case basis; and the contract system, where the attorneys bid on each case.<sup>7</sup> In 1914, the first public defender office was originated in Los Angeles County.<sup>8</sup> To think that public defense offices immediately sprang up throughout the country is erroneous, however; forty-seven years after the first system originated, only three percent of the counties nationwide had a public defender program.<sup>9</sup>

But, with the increasing number of liberal judges in the Supreme Court, there arose a need to protect the accused indigent from suffering at the hands of the rich. Thus came the emergence of the "bureaucracy versus adversary justice" conflict<sup>10</sup>, with the top court in the United States siding with the poor. The economic, social, and political forces of history have had a profound effect on the public defender system as

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<sup>3</sup> Ibid., p. 8

<sup>4</sup> Ibid.

<sup>5</sup> Portman, 1985, p. 365

<sup>6</sup> Destheings, 1972, p. 722

<sup>7</sup> Portman, 1985, p. 367-68

<sup>8</sup> Mounts, 1982, p. 474

<sup>9</sup> Ibid.

<sup>10</sup> Barak, 1975, p. 3

they have had on other institutions<sup>11</sup>, and these factors have helped shape the present-day concept of “right to counsel” via Supreme Court caselaw.

The first of ten landmark Supreme Court cases affecting the indigent’s right to free legal counsel was Johnson v. Zerbst<sup>12</sup>, which required appointment of counsel for those unable to retain, but only applying in Federal cases. Next, and definitely the most influential case, was Gideon v. Wainwright<sup>13</sup>, and the Supreme Court held in this case that the Sixth Amendment dictated that the State, as well as the Federal government, must provide counsel to indigent clients, but only in felony cases--a stipulation not relaxed for nine years. Gideon v. Wainwright was followed up by a number of cases requiring counsel if requested at various levels of the criminal justice system. Douglas v. California<sup>14</sup> held that counsel must be provided for the first level of appeal after conviction; Miranda v. Arizona<sup>15</sup> required that counsel be provided if requested during police interrogation in order to protect the Fifth Amendment’s right against self-incrimination; U.S. v. Wade<sup>16</sup> held that counsel must be provided if requested at a pretrial lineup; In re Gault<sup>17</sup> decided that an indigent has the right to counsel at the trial stage in a delinquency hearing; and Coleman v. Alabama<sup>18</sup> provided indigents the right to counsel at a preliminary hearing. And finally, three more landmark cases provided indigents with more access to free legal counsel: Argersinger v. Hamlin<sup>19</sup> determined that an indigent will be provided legal representation in any case in which a conviction might result in incarceration; and

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<sup>11</sup> Ibid.

<sup>12</sup> 304 U.S. 438 (1938)

<sup>13</sup> 372 U.S. 353 (1963)

<sup>14</sup> 372 U.S. 353 (1963)

<sup>15</sup> 384 U.S. 436 (1966)

<sup>16</sup> 388 U.S. 218 (1967)

<sup>17</sup> 387 U.S. 1 (1967)

<sup>18</sup> 399 U.S. 1 (1970)

<sup>19</sup> 407 U.S. 25 (1972)

Gagnon v. Scarpelli<sup>20</sup> and Morrissey v. Brewer<sup>21</sup> granted indigents the right to counsel in certain parole and probation revocation hearings. The combined effect of these ten landmark Supreme Court cases was insuring a fair trial to the indigent. And since ninety percent of people charged with felonies and fifty percent of people in misdemeanor court are indigent<sup>22</sup>, these cases resulted in the rise of the public defender.

So, the public defender program has undergone changes as have other social programs in the United States. What once was deemed a charity is now embedded in the court system as a constitutional requirement. The shifting of focus during the mid-1900s from the wealthy to the indigent has brought our court system closer to the idealized version set forth by our forefathers in the U.S. Constitution.

### **III. MISCONCEPTIONS OF PUBLIC DEFENSE**

The importance and necessity of the public defense system is known and understood by the members of society who are in touch with the happenings of the criminal justice system; sadly, however, these knowledgeable people are few and far between. The majority of society has little knowledge of the criminal justice system, with what little they do know coming from television. Shows like "L.A. Law" and "Law & Order" are based on the genre of "good versus evil," with the "good guy" represented by an ethical, by-the-book attorney with a sterling reputation, and the "bad guy" represented by a sleazy, crooked, underhanded attorney. And we know who always wins. Never do these law dramas address common issues such as excessive caseloads, assembly line justice, and plea bargaining. Of course the essence of shows like "L.A. Law" and "Law & Order" is aesthetic drama with the intent to attract

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<sup>20</sup> 411 U.S. 778 (1973)

<sup>21</sup> 408 U.S. 471 (1972)

<sup>22</sup> Portman, 1985, p. 364

and maintain viewers, so critiquing these shows is unnecessary. However, because the public derives an understanding of the criminal justice system from them, society simply assumes that the “real-to-life” process is the same--whereas in actuality, there are few parallels.

Thus are born the many misconceptions of the criminal justice system. Since the focus at hand is on the public defense system, I will only be dealing with those related misconceptions, which include misconceptions that (1) the public defender is merely a tool of the court; (2) too much time and money are given to the public defense system; (3) the public defense system is not the best method of providing free legal representation to indigents; (4) public defenders do not like their jobs and are in the field only because they are incapable of succeeding in any other branch of law; (5) public defenders are inferior to other attorneys; (6) public defenders are as evil and corrupt as those they represent; and (7) the public defender is more concerned with decreasing his or her caseload than with providing his or her client with adequate representation. Before I begin to delve into these misconceptions, it is important to note that (1) these seven misconceptions are only the ones that I consider as most common, but there are many more that could be addressed; and (2) I have chosen to focus only on the public defender, but in actuality, the public misconceives many other facets of the criminal justice system (i.e. police work, judicial responsibilities, origin of crime, hired attorneys’ work, etc...).

**MISCONCEPTION #1 --> The public defender is merely a tool of the court that is expected to go through the motions of providing zealous (?) advocacy while aiding in the conviction of his or her indigent clients.**

The origin of this misconception most likely stems from the closeness in which the public defender works with the prosecutor and judge. What the public sees as fraternization is, in actuality, the public defender attempting to “work a deal” with the



prosecutor, usually in the form of a plea bargain. The public defender has his or her client's best interests in mind when conducting these deals, for s/he is attempting to lessen the sentence sought by the State in exchange for a guilty plea, if in fact the defendant is guilty. Though each indigent case is treated on an individual basis, the public defender has other cases to discuss with the prosecutor, who also has other cases, and their mutual presence in the courtroom provides an opportunity to discuss these other cases. And though the indigent might never have been involved in court proceedings, his or her defender has, and as a result has developed a relationship with the other members of the courtroom work group. What the public, or more specifically the indigent, might view as a coalition between the public defender and the prosecutor is actually an act in the client's best interests; and the friendlier the relationship between the public defender and the prosecutor and judge, the greater the chances of cooperation and leniency on their parts.

Also, those familiar enough with the system to know that the public defender is hired by the courts and paid by the government feel that the public defender is merely a tool of the courts. They believe that expecting an attorney to provide adequate opposition is ludicrous so long as the government signs the public defender's paycheck. This view, originating due to ignorance on the part of the public, contradicts the purpose of assigned legal counsel set forth in the Constitution.

The right to effective assistance of counsel is now generally recognized as a constitutional requirement of due process in accordance with the Sixth Amendment right to counsel and to the due process provisions of the Fifth and Fourteenth Amendments.<sup>23</sup> The testing of a case through the adversarial process requires representation by an attorney, and she or he must serve as an active advocate.<sup>24</sup> The Supreme Court of the United States supported the right to effective assistance of

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<sup>23</sup> Destheings, 1972, p. 721

<sup>24</sup> Sanchez, 1989, p. 930-31

counsel in Evitts v. Luccy<sup>25</sup> and set forth the following as its rationale: “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will promote the ultimate objective that the guilty be convicted and the innocent go free.”

Since the Supreme Court recognizes the importance of partisan advocacy, then why do the courts of many jurisdictions resent the public defenders’ persistence in providing it? Suzanne Mounts aptly states, “[a] defender program is perhaps unique among government agencies in that the better it does its job, the more likely it is that it will be subjected to criticism.”<sup>26</sup> The fact is, some courts hire public defenders on the basis of their potential affiliation<sup>27</sup>, and it is commonly accepted that judges are biased toward appointing incompetent lawyers who are disinclined to go to trial and who often work for low fees.<sup>28</sup> Lisa J. McIntyre, who conducted an in-depth study of the 400-member Cook County Public Defense branch, found that many of the defense lawyers were worried about losing their jobs because of their zealous representation of their clients.<sup>29</sup> Even if the public defenders do not lose their jobs, their performance in the courtroom can be hindered by a hostile judge. Judicial hostility toward the defender program and the clients it represents can be evidenced by the judges’ attempts to curb zealous representation on the part of defenders.<sup>30</sup> Examples of such curbing are (1) making defenders wait until last to have their cases heard; (2) discouraging the bringing of legal motions; and (3) forcing defenders to pressure their clients to plead guilty rather than invoke their rights to jury trials.<sup>31</sup>

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<sup>25</sup> 469 U.S. 387, 394 (1985)

<sup>26</sup> Mounts, 1982, p. 481-82

<sup>27</sup> Geraghty, 1988, p. 1259

<sup>28</sup> Wheeler & Wheeler, 1980, p. 329

<sup>29</sup> Geraghty, 1988, p. 1259

<sup>30</sup> Mounts, 1982, p. 492

<sup>31</sup> *Ibid.*, p. 493-494

As a result of judicial hostility, many attorneys either choose not to enter the field of public defense or leave the field upon encountering the problems. Some defenders even conform to the unethical, unconstitutional standards of the hostile judge, thus reconfirming the public's stance on the public defender as a tool of the court. But those who tolerate judicial hostility and continue providing zealous advocacy base their styles of representation on the American Bar Association's (ABA) code of ethics, which reads:

"[t]he professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."<sup>32</sup>

As is the case in all fields of employment, as well as in all facets of life, every individual has the power of choice. Just as the banker has the choice to give loans at lower interest rates to friends, and the police officer has the choice to accept bribes in exchange for police protection, the public defender has the choice to aid the court in obtaining a conviction. The unethical individual performs in his or her own best interests, whereas the ethical individual performs in the best interests of his or her profession and those people with whom she or he comes into contact. The public defender has the choice to conform to judicial expectations and thus hinder the search for justice, and she or he has the choice to either disregard these judicial expectations or report the hostile judge to the proper authorities. This choice reflects the character of the individual, not the character of all public defenders.

**MISCONCEPTION #2 --> Too much time and money are given to the public defender by the judicial branch of the government**

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<sup>32</sup> E-C. 5.1, p. 6

Identifying the origin of this misconception is relatively simple; the public does not desire to contribute its tax dollars to the legal representation of indigents. This is because many of the people assume that if a poor person is accused of a crime, chances are that he or she is indeed guilty, and any amount of money spent on his or her behalf is too much.

The major premise of the United States court system is "Innocent until proven guilty." This concept--originated in our Constitution--provides everyone the opportunity to a fair trial; therefore, the plaintiff (prosecution) has the burden of proving the defendant's guilt. This premise also demands *voir dire*, or the process of selecting fair and impartial jurors. Furthermore, this jury must return a unanimous verdict in order for the defendant to be convicted. All of these regulations are to insure that an innocent person is not sentenced to serve time for a crime she or he did not commit.

Yet the majority of the population determines a defendant's guilt before any of the facts are presented. Subsequently, the members of the general population perceive public defense as a waste of their tax dollars and of the court's time. Again referring to popular law-dramas on television, the viewer needs only to see the actor or actress portraying the defendant to determine guilt or innocence. This also applies to syndicated courtroom dramas such as "The Judge" and "Superior Court." The guilty party has a rough and unkempt appearance, beady eyes, and a constant sneer; and the innocent party is clean-cut, attractive, and respectful to the court. In reality, the appearance of the defendant is controlled by his or her attorney, who dictates what appearance would work to the benefit of his or her client. For example, a young woman accused of burglarizing a jewelry store might be advised not to wear jewelry, to wear clothing not so shabby as to illustrate a need for money yet not so ritzy as to lead the judge (or jury) to wonder how she came upon the money to purchase the clothing, and to smear her make-up in order to illustrate despair. A Wall Street broker

would be advised to dress conservatively rather than to show up in court wearing a tailored Italian suit. On the other hand, television would present our young female burglar and Wall Street broker in accordance with their guilt or innocence. So, once again we can thank the influence of television for connecting appearance with guilt, which in turn influences the television viewers to deem public defense as worthless. After all, why waste time and money on a public defender system when guilt or innocence can be determined merely by the appearance of the defendant?

In actuality, lack of time and money are two impediments to the public defender system. As K. R. Fawcett states, "[a]ny impediment to the adversary system of justice creates an impediment to the search for truth," and she labels lack of funding and lack of trial skills as the two major impediments.<sup>33</sup>

The ideal public defense system includes sufficient State and Federal funds, but present-day systems do not receive sufficient financial aid to function efficiently. Presently, the nationwide Legal Services Corporation funds free legal services for the poor, but the corporation is having a hard time funding due to a severe cutback in Federal funds.<sup>34</sup> Mounts states, "[f]or whatever reason, almost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds."<sup>35</sup> Funds for public defense are appropriated by politicians who, not immune to the sentiments of the public, cannot appropriate many funds, for fear of disapproval.<sup>36</sup> Not only is lack of funding affecting the performance of the public defense system and its employees, but it is also discouraging a number of competent attorneys from entering the field. This is evidenced by statistics showing that the average starting attorney salary in Chicago at major firms is \$50,000 - \$75,000,

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<sup>33</sup> Fawcett, 1987, p. 574

<sup>34</sup> Pileggi, 1982, p. 23

<sup>35</sup> Mounts, 1982, p. 483

<sup>36</sup> Ibid.

whereas the starting public defender salary in Chicago is just \$24,300.<sup>37</sup> It stands to reason, then, that the top-notch graduating law students are much more likely to opt for the former than for the latter.

Next, Fawcett determined that lack of adequate trial skills is a major impediment to the proper representation of indigents. She states that “[t]he adequacy of the adversarial system of justice depends on the adequacy of the lawyers who produce and test evidence at trials,...[and] proficiency equates with a high degree of skill in advocacy.”<sup>38</sup> She believes that criminal defense lawyers especially must be proficient at trial skills because they alone bear the burden of meeting the state’s case<sup>39</sup>, and she claims that cross-examination and objection to direct examination testimony by prosecution witnesses are both vital trial skills because when not performed competently, the truth might not come out.<sup>40</sup>

How does one develop these trial skills? The ABA now requires “effective training” for defenders and assigned counsel “because programs for this purpose are deemed crucial to the delivery of effective defense services.”<sup>41</sup> Again referring to Fawcett, she states that the goal of effective training in trial skills is to reduce, and ideally eliminate, serious performance errors by otherwise competent defense counsel.<sup>42</sup> Providing proper training in trial skills returns us to our original quandary: lack of funding. Though the ABA demands training of vital trial skills, little or no money is allocated for training seminars. So either the ABA overlooks this stipulation, or it considers that the nation’s law schools provide this “effective training,” or it simply overlooks this stipulation.

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<sup>37</sup> Sullivan, 1989, p. 1

<sup>38</sup> Fawcett, 1987, 575-76

<sup>39</sup> Ibid., p. 576

<sup>40</sup> Ibid., p. 577

<sup>41</sup> ABA Standards for Criminal Justice, 5-1.4

<sup>42</sup> Fawcett, 1987, p. 575

So, the public's belief that too much time and money are given to the public defender system is completely erroneous; instead, not enough time and money are given. Lack of funding hinders the public defender's ability to prove his or her client's innocence. If the client was not indigent and could afford the services of an attorney from a successful law firm, s/he would have the benefit of an extensive search for evidence, such as financing an out-of-state witness's trip to the relevant jurisdiction, obtaining specialists, and utilizing the firm's private detective to investigate the alleged crime. Due to lack of Federal and State funds, the public defender cannot afford his or her clients these luxuries. And also due to lack of funding, necessary trial skills are obtained by the public defender via actual courtroom experience--a trial-by-error process in which someone is the reluctant recipient of the error. So, in order for the public defender to provide the constitutional right to effective counsel, she or he must be provided adequate funding.

**MISCONCEPTION #3 --> The public defense system is not the best method of providing free legal representation to indigents.**

The key point of this misconception is that the vast majority of persons having the ability to grasp the peculiarities of the court system is educated. Acknowledging the disparity in social classes in the United States, most of the individuals participating or having participated in higher education come from financially stable homes. Since these educated individuals have no use for the system, they condemn it and wish to save their tax dollars by abolishing public defense. Therefore, the people for which the public defense system was created have no knowledge of it unless they have directly been influenced by it. Because this misconception does not represent a proper cross-section of society, I will amend it by adding "..., according to those whose financial situation disallows access to it."

In order to pinpoint the origin of this misconception, one need only to take note of the other misconceptions discussed in this thesis. Based on the public's belief of the other six, it stands to reason that this misconception would be the conclusion by following the standard logical sequence of IF (A and B and C and D and E and F) THEN G. Thus, the essence of this misconception is merely the conclusion of various conditions.

Granted, the public defender system might not be the best method of providing free legal representation to indigents, but it is the best *existing* method. Following, I will discuss the other two methods of assigning counsel and discuss why the public defender system is by far superior to these other methods.

The three types of indigent representation are the contract system, court assigned private counsel, and of course, the public defender system. In a contract system, the state solicits bids from lawyers willing to handle indigent-defense work. Because the bidding is competitive, the flat fee for representation has actually dropped. But lawyers say that for the lower fees, the work is shoddy, and they claim that the only incentive for the low bidders is to dispose of their cases quickly.<sup>43</sup> This is proven by the increase in the number of cases reversed in part by appellate judges because the lawyering at the trials was so poor.<sup>44</sup>

The system in which the court assigns private counsel to represent indigents offers the attorney little or no discretion as to whether or not he or she will accept his or her appointment for an indigent accused<sup>45</sup>, and the attorney is not financially compensated for his or her services. The courts argue that (1) it is the attorney's duty as an officer of the court to render gratuitous service when appointed by the court, to defend an indigent accused; and (2) the obligation to render gratuitous service is a

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<sup>43</sup> Newsweek, 1982, p. 117

<sup>44</sup> Ibid.

<sup>45</sup> Destheings, 1972, p. 711



condition of the license to practice law, and the attorney consents to this condition when s/he applies for and accepts the license.<sup>46</sup> Attorneys who are required to accept indigent clients for no fee cry that their rights of Amendment XIV "...nor shall private property be taken for public use, without just compensation" and Amendment XIII "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States...." are being violated.<sup>47</sup>

This conflict leads to serious problems in the court system. An attorney, resenting the fact that she or he is forced under threat of contempt to represent indigents, may not provide adequate services as a result; therefore, the uncompensated, appointed counsel system serves to deny the indigent accused effective assistance of counsel as guaranteed by the U.S. Constitution.<sup>48</sup> Also having to suffer the consequences of this system are the attorney's regular paying clients, who are asked to pay higher fees in order to minimize the attorney's losses resulting from indigent representation.<sup>49</sup>

So that leaves us with the public defender system--hardly flawless but simply the best existing system of indigent representation. Ideally, a public defender system will attract defense-oriented attorneys with an interest in criminal law and procedure who want to defend indigents and who are equally as capable as prosecution attorneys.<sup>50</sup> This system is by far superior to the contract system because clients are assigned to public defenders according to compatibility--not auctioned off like cattle to the lowest bidder. The appointed counsel system is also inferior to public defense, not because of the concept but rather because of the reluctance of the attorneys. Ideally,

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<sup>46</sup> Ibid., p. 713

<sup>47</sup> Ibid., p. 714-16

<sup>48</sup> Ibid., p. 721

<sup>49</sup> Ibid., p. 722

<sup>50</sup> Ibid., p. 724

all attorneys would want to help those less-fortunate than themselves and would volunteer to represent the indigents free-of-charge; if this were the case, there would be no need for the public defender system. Since the private attorneys so vehemently oppose this concept, however, a less-experienced, less-competent, enthusiastic public defender would be of much better service as would an experienced, competent, unenthusiastic attorney.

The process of appointing a public defender is somewhat routine. The court's decision to appoint counsel at public expense is preceded by little or no investigation of a defendant's eligibility.<sup>51</sup> In court, judges ask defendants if they can afford to hire an attorney; if they say no, counsel is appointed. When the Public Defender's Office is appointed, it is required to conduct its own inquiry into each defendant's eligibility. Once the question of the defendant's eligibility is answered, the accused is assigned to an attorney by the office's Chief Public Defender. Which Deputy Public Defender will represent a defendant depends on the section of the court to which the defendant's case is sent. There is no "continuity of representation" by the Public Defender's Office--meaning that the defendant will not necessarily have the same lawyer at each court appearance--until a case reaches Superior Court.<sup>52</sup> Normally a felony defendant represented by the Public Defender's office will have only three different attorneys: one at intake at the Municipal Court arraignment, one at the preliminary hearing in that court, and one who handles all the proceedings if the case goes to Superior Court, and the defendant is arraigned again on a felony.<sup>53</sup>

So, for the reasons stated above, the public defense system is the best method of providing free legal representation to indigents. The Utopian system would involve all attorneys contributing to the cause, but that of course is not the case. There are

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<sup>51</sup> Hermann, Single, & Boston, p. 34

<sup>52</sup> Ibid., p. 35

<sup>53</sup> Ibid.

numerous weaknesses in the public defender system, but as far as what else is available to the indigent accused, public defense offers the best access to the constitutional right to a fair trial.

**MISCONCEPTION #4 --> Public defenders do not like their jobs and are in the field only because they are incapable of succeeding in any other branch of law.**

The origin of this misconception is rooted in the United States citizens' lust for money. Being as that our peers judge our success in terms of material possessions, Americans strive for the money necessary to achieve a particular social class. Therefore, many of us believe that to have money is to be happy, and to be poor is to be unhappy.

As a result of this belief, we often overlook the underpaid, overworked school teachers, social workers, and, public defenders, who represent the select few not conforming to society's emphasis on money. Take for example the recipient of a Masters degree in Divinity; here is an individual obviously possessing a great deal of intelligence in order to reach such a high level of education. One would guess that this person could have achieved success (and money) in various other fields, yet she or he chose to reject the norm and opt for a service-oriented career. To totally disdain society's emphasis on money, our recipient of the masters degree in Divinity might accept a pastoral position at a small church in a small country town for about \$13,000 a year.

The public defender parallels the person in the above anecdote. Of course, the situations are different--the public defender makes substantially more money than does the pastor, and the motivation for career selection might be different; but one motivating factor is shared by each--a desire to help others. Of course, some people might enter the ministry due to family pressure or for corrupt reasons (a la Jim Bakker),

and some attorneys might enter public defense due to an inability to succeed in any other branch of law. But I contend that the greater portion of public defenders remain as such because no other field of law offers as much opportunity for self-gratification.

In no institution other than the American courts can the poor enjoy the same opportunities as the wealthy. Though our great country deems everyone as equal, the poor do not have access to all of the means to achieve the ultimate end of equality. If not for the public defender, the indigent could not achieve equality in the courtroom, for she or he could not afford a competent attorney. Having a competent public defender providing zealous advocacy insures that the indigent will achieve equality in the courtroom and thus receive a fair trial.

So, when the public considers the public defender as incapable of succeeding in any other field of law, it overlooks that many of the defenders choose the field in order to help those members of society less fortunate than themselves. By seeing everything in dollars and cents, the public is blind to the fact that money is not always the most important achievement in a person's life. At the risk of being trite, society disdaining the public defender qualifies as "biting the hand that feeds...."

Law, by its nature, in and of itself, is a contribution to society. Unfortunately, no one seems to want to celebrate the efforts of those attorneys who hold themselves out as "public interest" lawyers.<sup>54</sup> As discussed earlier, few people can understand why anyone would wish to defend the poor, so the majority of the population believes the public defender is unhappy with the job. There is a bundle of information to refute this belief, however. Referring back to the study of Chicago's Public Defense branch, McIntyre noticed, "a high level of energy and dedication are present in the defenders"<sup>55</sup>; Mary Arundel, a Cook County public defender, states, "[t]his job has a

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<sup>54</sup> Elkins, 1984-85, p. 942-43

<sup>55</sup> Geraghty, 1988, p. 1257

sense of purpose...it's just so much more interesting!"<sup>56</sup>; Jacqueline Ross states, "I'm thrilled to death with what I'm doing, and I love it"<sup>57</sup>; and Scott Frankel declares that "[b]eing a public defender is more rewarding to me than making tons of money,"<sup>58</sup> and he goes on to say that the opportunity to help people and try criminal cases caused him to join the public defenders office.<sup>59</sup> Of course, the quotations of three individuals do not represent all public defenders, but expressions such as "sense of purpose," "interesting," and "rewarding" add credence to the theory that many public defenders enjoy their profession.

Contrary to the belief that the public defender is incapable of succeeding in any other branch of law, Arundel was a commercial real estate attorney before entering public defense.<sup>60</sup> Those who believe that incompetency is the only reason for being in public defense would have a difficult time justifying why many top-of-the-line graduating law students opt for the \$25,000-salary of the public defender as opposed to the \$75,000 offered by some large firms.<sup>61</sup> In 1982, when Chicago's elite Homicide Task Force--comprised mostly of public defenders--expanded its work force, it received almost twenty applications for every opening, despite offering a starting salary of only \$27,500.<sup>62</sup> When Mary Arundel was asked why she left her lucrative job in real estate in favor of a position at the public defender office, she simply stated, "the money had nothing to do with it."<sup>63</sup>

If money has nothing to do with why one would leave a well-paying job to accept a position as a public defender, then what is the reason? A study by Becker &

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<sup>56</sup> Sullivan, 1989, p. 1

<sup>57</sup> Ibid.

<sup>58</sup> Ibid., p. 14

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., p. 1

<sup>61</sup> Ibid.

<sup>62</sup> Cohen, 1982, p. 88

<sup>63</sup> Sullivan, 1989, p. 1

Meyers was designed to answer this question. In 1972, the two men conducted a survey of third-year law students in Chicago to see if they were more devoted to social service than were the previous generation of law students. The study showed that 47% of those surveyed were Liberal and 8% were Conservative, whereas in 1949, 15% of law students in Chicago were Liberal and 53% were Conservative.<sup>64</sup> And 65% of those polled believed that law students are committed to making changes to give all people more access to the political process.<sup>65</sup> So, this study indicated that law students were much more dedicated than were their mentors to utilizing their knowledge to help provide equality for "all people." Teresa Sullivan, in a study of the Cook County Public Defender's Office, found that several attorneys left lucrative practices to join the force, claiming the job compensated for lower wages with opportunities for service, responsibility, experience, and excitement.<sup>66</sup> Expanding upon this opportunity to serve, Arundel declared, "[t]here's a lot of people out there who need help, and I am dedicating my life to providing it for them"<sup>67</sup>; and Ross states, "[a]nybody wanting to do public service and be deeply involved--[public defense] is the way to do it."<sup>68</sup>

Hopefully the previous quotations and case studies have shed some light on the public defenders' reasons for entering the field. The only thing they are incapable of is not caring; every case provides an opportunity to make a difference in a life. Sure, they are underpaid, overworked, unappreciated, and misunderstood. But public defenders love their jobs because, unlike their privately-hired counterparts, they are providing a service to society, and no price tag could ever be placed on this service. Public defenders make use of their God-given intelligence and talents to serve the

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<sup>64</sup> Becker & Meyers, 1972, p. 631

<sup>65</sup> Ibid.

<sup>66</sup> Sullivan, 1989, p. 1

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

public, and according to Mary Arundel, Jacqueline Ross, and Scott Frankel, the reward of helping the poor is the highest payment they could ever receive

**MISCONCEPTION #5 --> Public defenders are inferior to privately paid criminal defense attorneys and to the State's prosecuting attorneys in legal proceedings.**

Of the seven misconceptions discussed in this thesis, this one is not only the most common but also the most wrong. To believe that public defenders offer less expertise in legal proceedings than do privately hired attorneys and prosecuting attorneys is unjust enough to be considered foolish and ridiculous. Very few private attorneys specialize solely in criminal law; and most private attorneys rarely, if ever, participate in litigation. The public defender, on the other hand, must be a criminal law specialist, for his or her entire caseload consists of criminal cases; and the public defender spends nearly all his or her time in the courtroom litigating and plea bargaining, all the while gaining valuable experience to apply to future cases.

How, then, can anyone misconceive the public defender's skill in the courtroom? Two possibilities are the recurring influences discussed previously: money and television. At the supermarket, a person pays up to twice as much for a name product as she or he would have paid for an off-brand. Our rationale of the purchase is (1)"I've heard of this brand, so it must be good"; and (2)"I have to pay more for better quality." Of course an attorney can hardly be compared to a supermarket item, but the client/customer approaches the purchase of an attorney's services in a similar way: (1)"This attorney has a good reputation in the community"; and (2)"his prices are the highest in town, so he must be the best." Though the public defender is not available to clients with money to spend, people can judge the defender's ability in a similar fashion: (1)"I've never even heard of this guy"; (2)"he's a public defender, and we all know about those guys" (See misconception #6); and (3)"What can you

expect from a lawyer who doesn't get paid by his clients? If he works for free, he must be terrible."

The other influence on the public's misconception of the public defender as less competent than his or her opposition is television. Once again law dramas negatively affect the public's view of the public defender. Shows like "Law & Order" and "Reasonable Doubts" always have the prosecutor outperforming the public defender in cases where the accused is indigent. Very rarely, if ever, has a show focused on a public defender, and if so, the focus was most likely on the evil and corruptness. I would venture to guess, however, that the job of the public defender has never been glamorized by Hollywood.

This, however, is easily understood because the public defender is *not* glamorous. Public defense is blue-collar employment; there is no glitter, no glamour, and no romance; few aspire to be a defender, and there is little or no appreciation for those who work in the field; and long hours of hard work net low wages. This is not the type of person that impresses the television viewers. They want to see excitement, romance, and happy endings, and a realistic show about public defenders would not provide these elements. So, defenders are typecast as the opponents of the "heroes" and of course always lose the case. Thus, television once again plays a major role in creating misconceptions of public defense--incompetency in the courtroom in this instance.

Although the public may believe that public defenders are not as effective as privately retained counsel, the research which has compared the efficiency of service in terms of outcome provided by the public defenders versus privately retained counsel concludes that the type of attorney has little effect on outcomes.<sup>69</sup> Barak determined that "in the average criminal case, the public defender is equal in quality

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<sup>69</sup> Balkin & Houlden, 1985, p. 176



and competence to the average private attorney practicing criminal law.”<sup>70</sup> Evaluators of legal defense services in Seattle concluded that “the public defender association is providing legal services to indigent defendants that are as good or better than those presently being provided by the private bar to non-indigent defendants.”<sup>71</sup> A study by Nicholas Pileggi in 1981 revealed that the Legal Aid Society’s 460 public defenders represented 159,620 criminal defendants--seventy percent of all people charged with crimes in the city’s criminal courts. Yet, these lawyers managed to win acquittals in almost half the cases they took to trial.<sup>72</sup> Jane Quinn found that eighty to eighty-five percent of all public defenders’ cases going to court are won.<sup>73</sup> And Frank Bell, California’s State Public Defender in 1985, declared that “[p]ublic defenders set the standard for quality appellate representation in California.”<sup>74</sup>

It is possible for a privately retained attorney to be a more highly skilled litigator than a public defender, and the inverse is also quite possible. However, *all* attorneys have to provide adequate representation to their clients. Margot Cohen believes that passion is the root of effectiveness in the courtroom, and with it one can easily surpass this standard level of adequacy defined by the courts.<sup>75</sup> Repeating K. R. Fawcett’s quote (Misconception #2--page 12), “The adequacy of the adversarial system of justice depends on the adequacy of the lawyers who produce and test evidence at trials.” Her view was supported by the United States Supreme Court in Powell v. Alabama<sup>76</sup>, in which the Court decided that an individual has the right to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness.

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<sup>70</sup> Barak, 1975, p. 3

<sup>71</sup> Wheeler & Wheeler, 1980, p. 327

<sup>72</sup> Pileggi, 1982, p. 30

<sup>73</sup> Quinn, 1982, p. 70

<sup>74</sup> Bell, 1985, p. 369

<sup>75</sup> Cohen, 1982, p. 88

<sup>76</sup> 287 U.S. 45 (1932)

Barak does not believe that a public defender can be compared to a private criminal defense attorney. He set forth four reasons why the comparison is impossible: (1) public defense is a legislative, not a judicial act; (2) the structural “guilt” of the indigent coupled with the relative infrequency of non-indigents coming in contact with the criminal side of the law; (3) the most skilled members of the legal profession were exempted from the traditional obligation of rotation (the periodic assignment of representing uncounseled defendants on behalf of the court); and (4) the criminal branch of the legal profession consists of the least-skilled members of the bar and is one of the least remunerative areas of legal practice.<sup>77</sup> Also, the public defender has no choice as to what clients she or he will represent, whereas the private attorney will only accept cases that she or he can win. And a final reason for not comparing the public defender to the private attorney is that, according to a study by Gerald Smith, 55% of the public defenders’ clients remain incarcerated whereas only 17.4% of the clients of hired counsel are in jail.<sup>78</sup> Due to various factors (appearing in front of the jury and/or judge in jail-garb as opposed to a suit and tie, for example), the balance of the scales of justice are weighted in favor of the prosecution before the trial even begins.

Despite the belief of the public that he or she is less competent than private attorneys, the public defender provides more than adequate representation to his or her clients. Whereas the public bases its opinion of the public defender on his or her free representation of indigents and on his or her television stereotype, scholars base their opinions on studies, courtroom results, and statistics. The Constitution requires that all people be afforded the right to effective counsel, and the Bar exam exists to insure that those entering the field are capable of providing this adequate representation. Most scholars, following the “apples and oranges” train of thought,

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<sup>77</sup> Barak, 1975, p. 3-4

<sup>78</sup> Wheeler & Wheeler, 1980, p. 324

declare it impossible to compare the two types of attorneys, due to the many incongruencies between public defense and privately retained attorneys. One fact outshines all others, however; courtroom proceedings on television do not parallel those in the "real world," nor do the attorneys and their methods parallel the ones employed both privately and by the courts. Basing an opinion of the public defender on what one sees on television is ludicrous. The public defender is at least (if not more) as competent as privately paid criminal defense attorneys and to the State's prosecuting attorneys in legal proceedings; this opinion is based not on the numerous one-hour law dramas seen on television but on the twenty-four hour drama known as reality.

**MISCONCEPTION #6 --> Because public defenders attempt to put criminals back on the streets, they are just as evil and corrupt as the indigents they represent.**

Guilt by association--a concept that applies to many relationships, including the public defender-client association. Parents do not want their children associating with a kid stereotyped as a "bad egg" for whatever reasons; aspiring politicians are strongly encouraged by their campaign managers not to visit bars, race tracks, or any other establishment frequented by the so-called "shady" character; baseball's all-time hit king, Pete Rose, faces a lifetime ban from baseball and its prestigious Hall of Fame because of his fraternization with a less than desirable crowd of gamblers; and the prominent criminologist and sociologist Edwin Sutherland deduced that delinquency can be traced to one's association with other delinquents--a theory he referred to as Differential Association.<sup>79</sup>

What is absent in the public defender yet present in the above examples is choice. Pete Rose *chose* to run with the gamblers, and children *choose* the friends with whom they want to "hang out." Sure, the public defender chooses to represent

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<sup>79</sup> Adler, Mueller, & Laufer, 1991, p. 124-25

indigents; however, she or he has no choice who she or he represents. Just as the grocer rings up a sale to an obvious pusher, the public defender gathers facts from his or her client; the association is strictly business. The defender is merely performing his or her appointed duty on behalf of the indigent, and that of course is providing active and zealous advocacy.

Looking at the larger picture reveals a problem more deeply rooted in society than the problem of society's belief in guilt by association, and that is society's total disdain of the major premise of America's adversarial justice system: innocent until proven guilty. Instead, the accused is labeled guilty or innocent, depending upon the existing social and cultural factors of the defendant and how these factors are portrayed by way of the mass media market. The origin of this misconception is discussed in Misconception #2, so I will discuss the effects of it on the performance of the public defender, his or her feelings about representing hardened criminals, and the ethical requirements of the defender to his or her client.

Suzanne Mounts acknowledges that the public defender is very unpopular and is often associated with the crimes of his or her clients.<sup>80</sup> Though defenders oftentimes represent individuals of reprehensible morals, commiters of murder, child molesters, rapists, or commiters of incest for example, it is the duty of these defenders, imposed by the Constitution and by ethical responsibilities of an attorney, to zealously represent their clients in their attempts to avoid conviction.<sup>81</sup> The reactions of public defenders to the type of individuals they sometimes have to represent do not support the misconception at hand. John McNamara, a public defender in Chicago, said, "[w]e constantly have to deal with gruesome facts and depressing situations. A lot of people get hardened."<sup>82</sup> In Pileggi's studies of public defense in New York, he received a

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<sup>80</sup> Mounts, 1982, p. 482

<sup>81</sup> Ibid.

<sup>82</sup> Cohen, 1982, p. 88

similar answer from the majority of the defenders he questioned concerning the difficulties of representing hardened criminals: "...it's up to us to protect the accused, not to judge them."<sup>83</sup> In an era of violent crime and stiff sentences, people who talk about "protecting" the accused are apt to be regarded as misfits or outsiders, and this belief contributes to the misconception that public defenders are as evil and corrupt as the indigents that they defend. James Vinci best describes being labeled as a "bad guy":

"I know it's very hard to go running home at the end of a day yelling proudly that you've just gotten a child-molester off. I know we're constantly getting lots of criticism from family and friends. They're always accusing us of representing society's worst people. Our juries are hostile. Judges tend to lean against us. And yet, the only way I can deal with all this is to keep repeating that I'm the good guy and the D. A. is the bad guy. As good guys, we test the system. If we weren't out there constantly testing the system, prosecutors and cops could easily be out there sending the wrong people to jail. It's our job to keep them honest."<sup>84</sup>

"Legal ethics" courses are now available and required at the majority of law schools nationwide and will hopefully teach the future attorneys how to maintain good character and to resist unethical temptations.<sup>85</sup> But, one class does not of course provide actual hands-on experience in the resistance of temptation, so there need to be rules, regulations, and requirements for the attorney to follow in order to maintain a straight, or ethical, path.

Regardless of how the public defender views his or her client, he or she is required by the courts to provide zealous advocacy on behalf of that client. Two landmark cases support this requirement: United States v. Wade<sup>86</sup> and Coles v.

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<sup>83</sup> Pileggi, 1982, p. 30

<sup>84</sup> Ibid., p. 31

<sup>85</sup> Elkins, 1984-85, p. 944

<sup>86</sup> 388 U.S. 218 (1967)

Peyton<sup>87</sup>. In Wade, the justices deemed that the judicial system's "interest is not convicting the innocent [defense] counsel to put the State to its proof, [but rather] to put the State's case in the worst possible light, *regardless of what he thinks or knows to be the truth* (emphasis added)." In Peyton, the Supreme Court stated the following:

"Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed and to allow himself enough time for reflection and preparation for trial."

Rules and regulations supporting the requirement of zealous advocacy are included in the ABA's code of ethics. One pertinent rule is "a lawyer should represent a client zealously within the bounds of the law."<sup>88</sup> Another important regulation, repeated from Misconception #1, requires that:

"The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties...*his personal interest...should [not] be permitted to dilute his loyalty to his client.* (Emphasis added)"<sup>89</sup>

Also, "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."<sup>90</sup>

If an attorney does not follow the rules, regulations, and requirements of the courts, she or he can be subject to charges of neglect. Neglect can result in suspension from the practice of law if (1) a lawyer knowingly fails to perform services for a client and causes injury to a client; or (2) a lawyer engages in a pattern of neglect

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<sup>87</sup> 389 F.2d 224 (4th Cir.) cert denied, 393 U.S. 849 (1968)

<sup>88</sup> ABA Standards for Criminal Justice, Ethical Canon 7

<sup>89</sup> *Ib id.*, E-C 5-1

<sup>90</sup> *Ibid.*, E-C 7-8

and causes injury or potential injury to a client.<sup>91</sup> In California, if a reversal of judgment in a judicial proceeding is based on misconduct, incompetent representation, or willful misrepresentation by counsel, the attorney will be reported to the State Bar.<sup>92</sup> And finally, from the ABA Standards for Criminal Justice: "A [defense attorney's] belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination."<sup>93</sup>

By combining personal testimony, opinions of prominent scholars, court cases, and relevant passages from various rules and regulations, hopefully I have demonstrated that the law dictates the closeness in which the public defender has to work with his or her client, and that this closeness does not indicate that the defender enjoys, or even condones, the client's delinquent behavior. Guilt by association is not applicable to the public defender-client relationship. There exists only a business relationship, and anything above and beyond that is merely an attempt by the defender to accumulate enough facts to be able to offer a strong defense on behalf of his or her indigent client.

**MISCONCEPTION #7 --> The public defender is more concerned with decreasing his or her caseload than with providing his or her client with adequate representation.**

This misconception is one that is based on the truth; oftentimes the public defender does *not* provide adequate representation. The misconception here, then, is that the concern with decreasing caseloads is that of the public defender. Rather, the courts, by not employing nearly enough public defenders, have created the problem of excessive caseloads. Due to the number of indigent accused in the system,

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<sup>91</sup> Standards for Imposing Lawyer Sanctions, 1986, §4.42

<sup>92</sup> California Business and Professional Code, (West) 1982, §6086.7

<sup>93</sup> The Defense Function, 1980, §4-7.6 (b)

understaffed public defender offices are faced with a dilemma--do we threaten the accused's right to a speedy trial, or do we instead threaten his or her right to effective counsel?

This misconception stems from the aforementioned dilemma. First of all, as I have continually stressed throughout, the public defender has no discretion as to whom she or he is appointed to represent. When the defender arrives at work in the morning, she or he is presented with new clients; there are no interviews and no background-checks...there is simply no choice on the defender's part. He or she is expected to somehow juggle clients and court dates until the indigents' cases are closed. The greatest injustice is that the public defender is not just expected but *required* to provide all his or her clients with adequate representation--as defined by the courts.

So, if expected to perform such impossible feats, why is the public defender paid so little?!

This brings us back to the conflict of the indigent's rights: speedy trial versus effective counsel. If we turn to the courts for a resolution to this dilemma, we find that they are as confused as we are. If the public defender cuts back his or her time spent individually with each of his or her clients in favor of getting through his or her caseload, she or he can be found guilty of neglect; and, if the defender spends more time with some of his or her clients than with others in order to provide more effective representation, she or he can be found guilty of neglect by "ignoring" the rest of his clients' rights. In other words, and once again for fear of sounding trite, the overburdened public defender is "damned if he does...damned if he doesn't."

So in this section, I will focus in on the specific attorney-guidelines, including caselaw and rules and regulations. By doing this, contradictory information given by



the courts to the public defender is exposed. Finally, I will discuss some ways in which the defender can combat ineffectiveness due to an excessive caseload.

It is a known and accepted fact that defender organizations tend to develop a priority for moving their caseloads<sup>94</sup>, but this is because of the massive backload of cases in the court system. For example, in 1985, the state public defender office of California handled 30-40% of the total number of appellants in that state<sup>95</sup>, and that was on top of the vast quantity of indigent accused represented. The main problem confronting the attorney working as a public defender in a large urban office is an excessive caseload, and this leads to (1) attorney frustration; (2) disillusionment by clients; and (3) weakening of the adversary system.<sup>96</sup>

A conflict stems from this third effect (weakening of the adversary system). Is providing an accused a "speedy" trial more important than providing him or her with effective assistance of counsel? Apparently the courts are as confused about this as am I. There exist major contradictory directives in court rulings and regulations. Powell v. Alabama<sup>97</sup> dictated that an individual has the right to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness; Brexton v. Peyton<sup>98</sup> required that "[t]he assigned lawyer should confer with client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial"; and the ABA's code of ethics: "forbids a lawyer handling a legal matter without "preparation in the circumstruct,"<sup>99</sup> instructs a lawyer not to "neglect a legal matter entrusted him,"<sup>100</sup> and

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<sup>94</sup> Schulhofer, 1988, p. 44

<sup>95</sup> Bell, 1985, p. 370

<sup>96</sup> ABA Standards for Criminal Justice, 1982

<sup>97</sup> 287 U.S. 45 (1932)

<sup>98</sup> 365 F.2d 563 (4th Cir.) cert. denied, 385 U.S. 939 (1966)

<sup>99</sup> ABA Standards for Criminal Justice, D-R 6-101 (A)(2)

<sup>100</sup> *Ibid.*, D-R 6-101 (A)(3)

requires that “[a] lawyer should represent a client competently.”<sup>101</sup> But according to David Sudnow, excessive caseloads assigned by the same court system that requires effective assistance of counsel result in “little communication between the public defender and client. After the first interview, the defendant’s encounters with the public defender are primarily in court.”<sup>102</sup> The ABA says that “[e]mployment should not be accepted by a lawyer when he is unable to render competent service.”<sup>103</sup> But twenty-three members of the New York Legal Aid Society were fired in 1982 because they went on strike due to their belief that they were too overburdened to represent their clients adequately.<sup>104</sup> In Arizona v. Smith<sup>105</sup>, it was decided that “[a] lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyers’s capacity to give each client effective representation”; and State ex. rel. Escambia County v. Behr<sup>106</sup> allowed the public defender to withdraw from representation in felony cases when there is an excessive caseload. But in the same regards, In re Fraser<sup>107</sup> declared excessive caseload not to be a valid justification for falling below constitutional standards of representation.

How can public defenders combat excessive caseloads and continue providing adequate representation? Frank Bell believes that public defenders are too heavily relied upon and that their involvement ought to be in criminal appellate and writ matters only.<sup>108</sup> Mounts offers three suggestions on how to combat ineffectiveness due to excessive caseload: (1) attempt to withdraw from some cases, using Escambia as

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<sup>101</sup> Ibid., Ethical Canon 6

<sup>102</sup> Sudnow, 1965, p. 259

<sup>103</sup> ABA Standards for Criminal Justice, E-C 2-30

<sup>104</sup> Pileggi, 1982, p. 30

<sup>105</sup> 140 Ariz. 355, 363, 681 P.2d 1374, 1382 (1984)

<sup>106</sup> 354 So. 2d 974 (Fla. Dist. Ct. App.) (1978)

<sup>107</sup> 83 Wash. 2d 884, 889, 523 P.2d 921, 924 (1974)

<sup>108</sup> Bell, 1985, p. 373

justification; (2) bring a civil rights action alleging that, due to excessive caseload, ineffective representation is being provided; or (3) simply do the best that can be done and depend on the Sixth Amendment challenges of appeal or collateral relief to remedy any specific instances of ineffective representation.<sup>109</sup>

So, the reason why the public defender is overly concerned with decreasing his or her caseload is not because she or he wants to provide inadequate representation to the indigent accused but rather because the courts require that the defender develop this as a top priority. A conflict arises from the court's insistence that its public defenders serve as effective counsel, yet this same court overburdens each defender with clients. As a result of this conflict, many defenders provide representation just adequate enough to avoid charges of neglect while disposing of as many cases as possible. The results of this are unhappy clients, unhappy but job-secure public defenders, and happy judges. Our system of justice is set up for the benefit of the people however, and not for the judges, and placing a higher priority on "quick justice" than on effective assistance of counsel is a detriment to the system. Those who blame the public defender for the mixed-up priorities of the courts are mistaken and need only to look at the one wearing the black robe to find the origin of the problem.

The seven misconceptions of public defense that I have discussed in this thesis all contributed to the negativistic attitude of society toward the public defender. When speculating on the origin of each misconception, common denominators arose: television, money, and, most common of all, ignorance on the part of the public. Television glamorizes courtroom proceedings and utilizes the "good versus evil" genre, with the bad guy being the public defender. Society can not understand why an attorney would actually want to work for the comparatively low wages received in the field of public defense. Societal emphasis on money has a two-fold effect on the

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<sup>109</sup> Mounts, 1982, p. 517-18

public defender: (1) because defenders make substantially less than their privately hired counterparts, society determines that the defender is substantially less qualified; and (2) because the accused represented by public defenders have little or no money, these indigents are labeled by society as “scum,” “losers,” and “nobodies,” and representing these “losers” tarnishes the defender’s image. And of course, the basis of all the previously discussed misconceptions is ignorance on the part of the general population.

It is important to note that ignorance is not synonymous with stupidity however; it refers simply to a lack of knowledge. Sadly, but in reality, the public will remain ignorant of the importance of the public defender until someone in Hollywood sees a way to make some money by glamorizing the occupation, but I doubt that will ever happen. The only other way the public is informed of the public defender’s importance in the criminal justice system is by actually coming into contact with a defender, and this amounts to relatively few individuals. In short, public defenders are “stuck” with their reputation. But, the ones who are truly devoted to assuring that all people, even the most poor, receive a fair trial, will still be in the courtroom day after day arguing, pleading, justifying, and bargaining on behalf of the clients that they are assigned to represent.

## **CONCLUSION**

After exploring the origins and refuting the validities of seven common misconceptions of the public defender and his or her work, along with providing extensive research evidencing my claims, hopefully the public defender is now perceived by the reader as “resistance for the people.” What I cannot emphasize enough is that the public defender is a huge benefit, not a hindrance, to the American court system. Having passed the ABA’s Bar exam, an attorney is considered to be

capable enough to provide adequate services to his or her clients. The public defender, then, is not in the field because she or he could not pass the Bar, or because she or he is not as competent as "real" attorneys. Instead, many of the public defender attorneys use their position to aid those people financially less fortunate than themselves. By taking this position, a high degree of self-satisfaction more than makes up for the low salary received for the work. The public defender plays a vital role in the preservation of our constitutional rights. To disdain public defense is to do a grave injustice to the select few individuals who have passed up the opportunity to drive and to build in-ground swimming pools behind their two-story, five-bedroom homes in favor of serving society by representing the poor. In a country where money and self are everything, the public defender stands tall, disdaining money and reputation to protect the constitutional rights of all those who cannot afford to pay.

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